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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re H.A. et al., Persons Coming Under the
Juvenile Court Law.

SAN BERNARDINO COUNTY
CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

I.L.,

Defendant and Appellant.

E071602

(Super.Ct.Nos. J265034, J265035,
J265036 & J265037)

OPINION

APPEAL from the Superior Court of San Bernardino County. Christopher B.
Marshall, Judge. Reversed with directions.

Daniel G. Rooney, under appointment by the Court of Appeal, for Defendant and
Appellant.

Michelle D. Blakemore, County Counsel, and Svetlana Kauper, Deputy County Counsel, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant and appellant, I.L. (Mother), appeals from the November 5, 2018, orders placing Mother's four children in a legal guardianship, issuing visitation orders for Mother and the children's father, and terminating the court's dependency jurisdiction. (Welf. & Inst. Code, § 366.26.)¹ Mother challenges only the visitation orders for each child. She claims the orders impermissibly delegate either to each child or to the children's therapist the court's discretion to determine whether Mother will visit the children. We agree. Thus, we reverse the visitation orders and remand the matter for further proceedings.

II. FACTS AND PROCEDURAL BACKGROUND

A. *The Initial Dependency Proceedings for the Children (April and May 2016)*

Mother's four children were born between 2008 and 2012. In April 2016, the children were detained and placed in foster care. In May 2016, the court found the children were at risk due to Mother's methamphetamine use and unresolved mental health concerns, the father's methamphetamine use, and the father's incarceration without providing the children any means of support. (§ 300, subds. (b), (g).) The court ordered reunification services and supervised visitation for both parents.

¹ Undesignated statutory references are to the Welfare and Institutions Code.

In September 2015, Mother was placed on an involuntary psychiatric hold and was diagnosed with schizophrenia and depression. Thereafter, Mother engaged in mental health services, and plaintiff and respondent, San Bernardino County Children and Family Services (CFS), devised a safety plan for the children involving the help of maternal and paternal relatives. In February 2016, the father was incarcerated for possessing methamphetamine for sale, Mother was placed on a second involuntary psychiatric hold, and the family's relatives asked CFS for additional help with Mother. At that point, CFS referred Mother to additional mental health services.

CFS made an unannounced visit to the family home in April 2016, and found the home filthy and in disarray. Mother had left the children to feed and care for themselves while Mother slept for days. Mother admitted using methamphetamine and also admitted she had stopped taking her psychiatric medications for depression and schizophrenia. Mother claimed she was a "better mother" when she used methamphetamine and drank alcohol. She also said the father was "always . . . in the streets doing drugs." She admitted she needed the children to be in foster care while she received help.

B. The Six-month Review (November 2016)

In September 2016, Mother underwent a psychological evaluation. The evaluator noted that Mother continued to believe that methamphetamine made her a "better" person and parent. Mother said the drug made her "more affectionate, attentive and happy around her children" and better organized and able to "get things done." During the evaluation Mother was "experiencing active symptoms of a mental illness," including

psychosis, paranoia, depression, and thoughts of suicide. The evaluator noted that Mother did “not recognize when she decompensates psychiatrically and how this affects her ability to parent.” She was “not medication compliant and did not want to take psychiatric medications.” The evaluator concluded that the children would be at “great risk” if returned to Mother.

In November 2016, CFS reported Mother had been maintaining “consistent and positive visitation with the children,” and she was “spending more quality time with the children during the visits.” But CFS was not recommending any (unsupervised) overnight or weekend visits until Mother could show she had benefited from her services. The father had not participated in any services, and in August 2016 the father was again arrested and jailed for possessing methamphetamine for sale.

Thus, in November 2016, the court continued Mother’s services and supervised visitation. CFS reported Mother had made “some progress” in her case plan and services during the previous six months. Mother had completed a parenting class and was about to complete an outpatient program, but she had three positive drug tests and one missed test. She later admitted using methamphetamine between June and July 2016.

In January 2017, the court denied CFS’s request, by way of a nonappearance review packet, to allow Mother overnight and weekend visits based on her progress in therapy and substance abuse treatment. Mother’s therapist was treating her for bipolar I

disorder. In denying CFS's request, the court noted Mother had not been taking her psychiatric medication and questioned the status of her medication compliance.

C. The 12-month Review (April 2017)

In April 2017, the court continued Mother's services and supervised visitation, but terminated the father's services. Mother had completed all of her services, including substance abuse treatment, and tested negative for drugs in 11 random drug tests taken between November and April 2017. Although Mother continued to resist taking her psychiatric medication, she agreed to consult with her physician about her need to take the medication.

In April 2017, CFS reported Mother had "not been able to consistently demonstrate the benefits of [her] services" and recommended continuing her services. During visits, Mother "continue[d] to struggle with the children" and she was not implementing the "skills and knowledge" she had gained in her parenting classes and individual counseling. The children were "all over the place and at times, destroying property," but Mother made no attempt to gain control of the children and said they were "just having fun."

During several visits, Mother also had to be reminded not to have inappropriate conversations with the children. During one visit, Mother told the children they did not have to listen to their foster mother, and this created disorder in the foster home. The children were destroying things in the foster home and told the foster mother they did not

have to listen to her because Mother said they did not. Mother saw nothing wrong with what she told the children. The children refused to attend four visits with Mother in January and February 2017, after Mother asked the children inappropriate questions about the foster parents.

By April 2017, all four children were of school age: one was in preschool, another in kindergarten, and the oldest two were in the second and third grades. The children were receiving counseling services to assist them with “mood swings, defiance and severe tantrum behaviors.” The children were eating and sleeping well. CFS anticipated asking the court to liberalize Mother’s visits when she showed she had benefited from her services.

D. Mother Is Granted Unsupervised Visits (October 2017)

In October 2017, CFS recommended continuing the 18-month review hearing for two months, to December 2017, to allow Mother overnight and weekend visits and to assess Mother for family maintenance services. CFS reported Mother had “now demonstrated” her parenting skills on a continuing basis and continued to test negative for drugs. Mother was redirecting the children and gaining control of the visits. The children were “always very excited to see their mother and anxious to tell her about their day’s activities.” Mother had also “gone above and beyond” her court-ordered case plan by completing additional parenting classes and an aftercare program.

Mother’s physician also opined that Mother’s mental health symptoms may have been correlated with her substance abuse, and the physician was no longer recommending

that Mother take her psychiatric medication. Mother was maintaining stable housing and employment, and she had a support system which included her sisters, coworkers, and other family members. On October 11, 2017, the court approved overnight and weekend visits with Mother and continued the 18-month review hearing to December 2017.

E. The 18-month Review (December 2017)

In December 2017, CFS reported that Mother's first unsupervised visit occurred around October 16, 2017. At that time, the children were ages 5, 6, 8, and 9. The day after the visit, the children reported Mother pulled her six-year-old daughter's ear during the visit, causing the child pain. Mother denied the allegation, saying "the children are lying." The social worker spoke individually with each child, and each child reported concerns about having unsupervised visits with Mother. The social worker told Mother that the children's concerns were partially related to the trauma they were exposed to in Mother's care and advised Mother to be understanding and nurturing of the children's needs.

Mother had supervised visits with the children through November 2017. On November 30, Mother and the children had their first conjoint counseling session to discuss the children's physical abuse claim against Mother and the children's "past abuse exposure and concerns." The father was released from jail around early November 2017, and he did not contact CFS following his release. Mother admitted the father had visited her home on several occasions following his release from jail, and Mother missed a drug test on November 30. Mother did not understand why CFS wanted to know whether the

father was living with her or whether she and the father were together again. Mother also made a comment to the social worker that the social worker “can’t do anything” if the children saw the father with Mother during an unsupervised visit.

At the 18-month review hearing on December 12, 2017, Mother, through her counsel, denied being in a relationship with the father and claimed she understood that the father “cannot be around unmonitored or in the home.” Mother also understood that the father would have to comply with his case plan before she and the father could reunify. Mother asked the court to return the children to her care pursuant to a family maintenance plan, or authorize CFS to allow her unsupervised weekend and overnight visits.

Counsel for CFS and the children’s counsel recommended continuing the children in foster care as their permanent plan, with a goal of returning the children to Mother, and terminating Mother’s reunification services but offering her services under the permanent plan. The children’s counsel expressed concern that Mother, despite having completed two parenting courses and a court order not to use corporal punishment, resorted to physically abusing her six year old “the second [she] had an unsupervised visit.” In addition, the father had not completed any part of his case plan, and the paternal grandparents lived “right next door” to Mother. Counsel for CFS also questioned whether Mother had benefited from her services.

The court terminated Mother’s services, but continued her services pursuant to a permanent plan of foster care with the goal of returning the children to Mother. The

court granted Mother weekly, two-hour supervised visits, authorized CFS to increase the frequency and duration of the visits, and to grant unsupervised visits by nonappearance approval packet, and ordered the father not to attend Mother's visits. The father was again granted monthly visits, to be supervised by CFS or its delegate.

F. Postpermanency Review (June 2018)

In June 2018, CFS recommended setting a section 366.26 hearing to establish a permanent plan of either adoption or legal guardianship for the children. CFS was still concerned that Mother had not benefited from her services and that the children would be at risk if returned to Mother. On March 2, 2018, Mother admitted the father had been living with her. During a March 6 meeting with CFS, Mother did not see the risk of having the father around the children and kept saying it no longer mattered because the father was back in jail. On May 25, a social worker met with Mother and Mother's sister to discuss CFS's concerns and its recommendation for a legal guardianship with the current foster parents. Mother was angry and "made it clear" that CFS just needed to return the children to Mother and close the case so that Mother, the father, and the children could live as a family again.

The father was arrested in late January 2018 for unlawfully taking and driving a vehicle and being a felon in possession of a loaded firearm and a controlled substance. By June 2018, the father was sentenced to one year four months in custody. The father had not attempted to visit the children through CFS since before August 2016, and he did not contact CFS while he was out of custody between November 2017 and January 2018.

On June 12, 2018, the court set a section 366.26 hearing to establish a permanent plan of adoption or legal guardianship for the children.

G. The July and August 2018 (Interim) Visitation Orders

Between December 2017 and June 2018, the children were again refusing to visit Mother. The children reported that during supervised visits, Mother would accompany them to the restroom where she would question them and tell them they would be coming home with her soon. Two of the children were anxious before and after the visits, one child had nightmares about Mother trying to take him, and another child refused to sleep because she feared Mother was going “to get her in her sleep.” Mother had to be repeatedly reminded of what she could not say and do around the children due to the effect it had on them. CFS opined that Mother was “a trigger” for the children and her visits had become detrimental to them. The children were attached to their foster parents, felt safe with them, and wanted to remain with them if they were unable to return home.

In July 2018, the children were still refusing to visit Mother, and on July 6 CFS asked the court, through a nonappearance review packet, to suspend Mother’s visits based on the foster mother’s reports that the children were exhibiting severe behavioral problems when told they were going to visit Mother. In separate interviews, all four of the children said they feared Mother would take them during a visit and then “abandon” them as she had done when they were in her care.

On July 27, the court ordered Mother's visits to occur "in a therapeutic setting" pending an August 13 hearing on CFS's request to suspend the visits. On August 13, the court ordered that, pending the section 366.26 hearing, Mother's visits would occur weekly "in a therapeutic setting as appropriate depending on progress of children in therapy."

H. The November 5, 2018, Section 366.26 Hearing and Visitation Orders

At the time of the section 366.26 hearing on November 5, 2018, the children had been in foster care for two and one half years, since April 2016. Mother did not contest placing the children in a legal guardianship, but asked the court to order monthly supervised visits for Mother "in a therapeutic context to begin."

CFS and the children's counsel asked the court to suspend Mother's visits because they were detrimental to the children and, alternatively, asked the court to grant Mother monthly visits, supervised in a therapeutic setting. The children's counsel told the court her office had interviewed each child individually, and each child "reiterated the same concerns" they had expressed to CFS, including their "fear of being returned" to Mother and Mother "coming to get them." CFS acknowledged that Mother's visits had "go[ne] well for some time" but had deteriorated since October 2017.

The court found Mother's visits had been detrimental to the children. The court noted Mother had engaged in, "a good deal of inappropriate behavior" and also noted: "[T]here's been a clear and solid record from the children, from each of them, that there

have been issues, and that those issues have involved that following the visits, there's some regression; there's nightmares; there's issues with sleep."

The court then ordered that both Mother and the father would have monthly visits, to be supervised "[i]n a therapeutic setting *depending on the children's progress in therapy.*"² (Italics added.) The court expressly stated that the children were "certainly free to say at this point, 'no' to visits." The court's written section 366.26 orders for each child consistently stated that Mother's and the father's visits shall be: "One time per month for 2 hours supervised in a therapeutic setting, depending on the progress of the children in therapy."³ Mother appeals from the November 5, 2018, section 366.26 orders.

² As indicated, the court had previously ordered monthly supervised visits for the father, but the father had not visited the children through CFS since before August 2016.

³ At the November 5, 2018, hearing, the court asked CFS to revise the visitation section of the proposed section 366.26 orders "so the Court can, then, sign off on it *because it's a detrimental finding now.*" (Italics added.) But the proposed orders were not revised to reflect the court's detriment finding. The court's written section 366.26 orders for each child do not indicate that the court found Mother's visits would be detrimental to the children.

Further, the court's November 5, 2018, minute orders for each child state that "[t]he parents . . . have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." But the reporter's transcript of the November 5 hearing does not indicate that the court made this finding. To the contrary, the record shows the court did not consider placing the children for adoption or the application of the parental benefit exception to adoption at the November 5, 2018, section 366.26 hearing.

III. DISCUSSION

Mother claims the visitation portions of the section 366.26 orders impermissibly delegate the court's discretion to determine whether Mother could have any visits with the children either to the children themselves or to their therapist.⁴ We agree.

A. *Applicable Legal Principles*

When, as here, a court places a child in a legal guardianship, the court “shall . . . make an order for visitation with the parents or guardians unless the court finds by a preponderance of the evidence that the visitation would be detrimental to the physical or emotional well-being of the child.” (§ 366.26, subd. (c)(4)(C); *In re M.R.* (2005) 132 Cal.App.4th 269, 274.) But *anytime* a court orders visitation, the court may not delegate to *any third party*, including the child, a therapist, or the agency (here, CFS) “unlimited discretion” to determine whether visits between the child and parent will occur. (*In re Hunter S.* (2006) 142 Cal.App.4th 1497, 1505 [“A visitation order which fails to protect a parent’s right to visit is illusory. If, as here, the court grants visitation, ‘it must also ensure that at least some visitation at a minimum level determined by the court itself, will in fact occur.’”].)

⁴ CFS argues Mother has forfeited her appellate challenge to the visitation orders because she did not object to the orders at the section 366.26 hearing. Notwithstanding Mother’s failure to object, we exercise our discretion to consider Mother’s claim because it presents a pure question of law which we may determine based on undisputed facts. (See *In re Miguel C.* (2011) 198 Cal.App.4th 965, 970-971.) We also observe that the father objected to the visitation orders as “vague” to the extent they conditioned visits on the children’s “progress in therapy.”

Indeed, “the power to decide whether *any* visitation occurs belongs to the court alone.” (*In re S.H.* (2003) 111 Cal.App.4th 310, 317.) Thus, anytime the court “permits a third party, whether social worker, therapist or the child, to determine whether any visitation will occur, the court violates the separation of powers doctrine.” (*Id.* at p. 318; *In re Julie M.* (1999) 69 Cal.App.4th 41, 51.)

B. *Analysis*

Because the court ordered visitation for Mother and the father when it placed the children in legal guardianship, the court had a duty to ensure that ““at least some visitation”” would occur ““at a minimum level determined by the court itself”” and not by the children, their therapist, or any other third party. (*In re Hunter S.*, *supra*, 142 Cal.App.4th at p. 1505.) In other words, the court had a duty to “specify the frequency and duration of [the children’s] visits.” (*In re Grace C.* (2010) 190 Cal.App.4th 1470, 1478; *In re M.R.*, *supra*, 132 Cal.App.4th at p. 274.)

Although the court’s November 5, 2018, visitation orders specify that visits with each parent would occur “[o]ne time per month for 2 hours supervised in a therapeutic setting” the orders further specify that the visits will occur, “depending on the progress of the children in therapy.” By conditioning the children’s visits on their progress in therapy, the court effectively allowed each child or the children’s therapist to determine whether any visits would occur. This was improper.⁵

⁵ Other courts have disapproved similar visitation orders as improperly delegating the court’s authority to determine whether visitation will occur. (See, e.g., *In re Hunter S.*, *supra*, 142 Cal.App.4th at p. 1505 [court erroneously ordered visitation ““as can be

C. *CFS's Reliance on In re Sofia M.* (2018) 24 Cal.App.5th 1038 (Sofia M.) *Is Misplaced*

Relying on *Sofia M.*, CFS argues the burden was on Mother to propose a specific visitation order that would overcome the children's refusal to visit her, or "the negative physical and psychological manifestations all four abused children exhibited." *Sofia M.* is distinguishable. In contrast to Mother here, the mother in *Sofia M.* claimed the juvenile court *failed to enforce* its visitation order. (*Sofia M.*, *supra*, 24 Cal.App.5th at pp. 1044-1047.)

In rejecting the mother's claim, the *Sofia M.* court first held that the visitation order was proper, and did not "create[] [any] uncertainty" about the mother's entitlement to visitation, because it "simply ordered visitation, twice a week, for four hours at a time." (*Sofia M.*, *supra*, 24 Cal.App.5th at p. 1046.) The *Sofia M.* court next clarified

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arranged'" because it effectively allowed the child to "veto visitation"]; *In re S.H.*, *supra*, 111 Cal.App.4th at pp. 318-319 [reversing visitation order that provided "'if the children refuse a visit, then they shall not be forced to have a visit'" because it "effectively [gave] the children the power to veto all visits."]; *In re Julie M.*, *supra*, 69 Cal.App.4th at pp. 48-49 [reversing visitation order that granted the children the option of not attending any visits because it allowed them "absolute discretion to decide whether [their mother] could visit with them."]; *In re Donovan J.* (1997) 58 Cal.App.4th 1474, 1476-1477 [reversing visitation order that the father was to have "'no visitation rights without permission of minors' therapists'" because it delegated to the therapists "unlimited discretion to decide whether visitation is appropriate."]; *In re Jennifer G.* (1990) 221 Cal.App.3d 752, 755 [reversing visitation order that specified visits would "'be under the direction of the Department [of] Social Services'" because "the determination of the right to visitation and the frequency of visitation . . . must be made by the court."].)

that there is a difference between the propriety of a visitation order *and its enforcement*, and held that, “[w]hen a child refuses visitation, it is the parent’s burden to request a specific type of enforcement, or a specific change to the visitation order. Absent a request, it is not the court’s burden to sua sponte come up with a solution to the intractable problem of a child’s steadfast refusal to visit a parent.” (*Ibid.*)

In contrast to the visitation order in *Sofia M.*, the visitation order here improperly delegated to each child or to the children’s therapist the power to decide whether visits with Mother (or the father) would occur. And unlike the mother in *Sofia M.*, Mother is not claiming the court failed to enforce its visitation order. Indeed, the improper visitation order here was unenforceable because it effectively allowed the children and their therapist to decide whether any visits would occur. (*In re Hunter S.*, *supra*, 142 Cal.App.4th at p. 1505.)

If, on remand, the court issues a proper visitation order consistent with the children’s well-being, and the children still refuse to visit Mother, it will then be Mother’s burden “to request a specific type of enforcement, or a specific change to the visitation order.” (*Sofia M.*, *supra*, 24 Cal.App.5th at p. 1046.) But if all reasonable efforts to address the children’s fears and to persuade them to visit Mother have been exhausted, Mother may be unable to devise an enforceable solution to what may prove to be the intractable problem of the children’s steadfast refusal to visit Mother. (*Id.* at pp. 1046-1047.)

IV. DISPOSITION

The November 5, 2018, visitation orders are reversed, and the matter is remanded to the juvenile court for further proceedings consistent with this opinion.

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FIELDS
J.

We concur:

CODRINGTON
Acting P. J.

RAPHAEL
J.